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IN THE

Supreme Court of the United States

October Term, 1955

No. 663

ELMO T. CHRISTIANSON and HERMAN PASTER,
Petitioners,

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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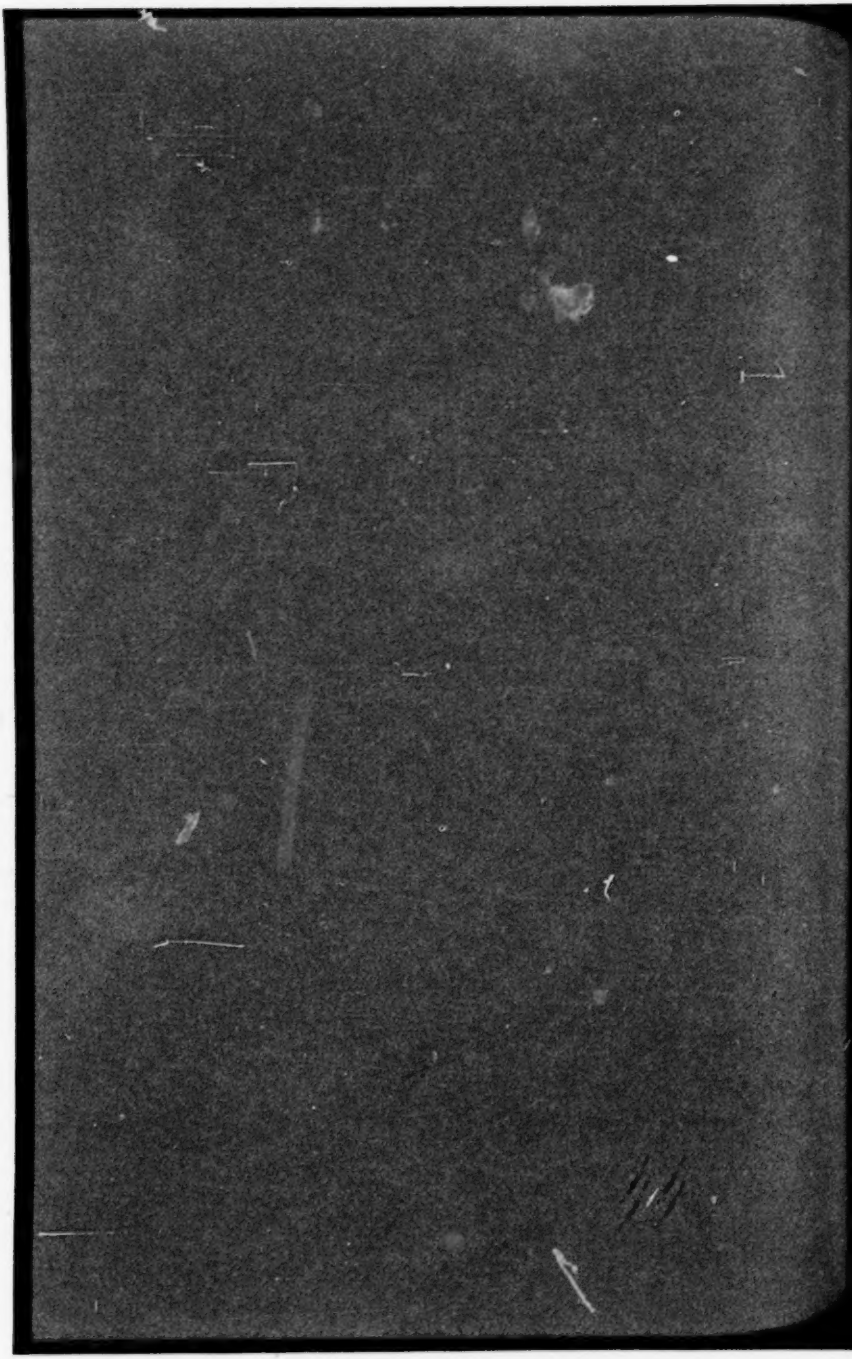

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled case on November 1, 1955.

CITATION TO OPINION BELOW

The District Court rendered no opinion. The opinion of the Court of Appeals for the Eighth Circuit, printed as an appendix hereto, is reported at 226 F. 2d 646.

JURISDICTION

The judgment of the Court of Appeals was entered in November 1, 1955. Rehearing was denied on December 5, 1955. On December 27, 1955, the time for filing a petition for a writ of certiorari was extended by order of Mr. Justice Clark to and including February 3, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. What the proper standard of proof should be as to the nature and existence of a conspiracy to violate a federal law where the conspiracy was formed prior to the effective date of the federal law.

2. Whether the Court of Appeals abdicated its function of reviewing the evidence to determine if it was sufficient to satisfy the standard of proof as to an unlawful conspiracy.

3. Whether there is a fatal variance between an indictment for a conspiracy to violate a federal law and proof of an agreement to bribe state officials and extort money from private individuals in violation of state law.

4. Whether the sole stockholder and principal officer and director of a corporation can claim the privilege against self-incrimination under the Fifth Amendment as to corporate records ordered to be produced, where the keeping of such records was required for no purpose other than the disclosure of violations of law.

5. Whether the Government may utilize evidence illegally seized from a solely-owned corporation in the trial of the individual owner of that corporation.

STATUTES INVOLVED

15 U.S.C. § 1172 (Johnson Act):

> It shall be unlawful knowingly to transport any gambling device to any place in a State, the District of Columbia, or a possession of the United States from any place outside of such State, the District of Columbia, or possession: Provided, That this section shall not apply to transportation of any gambling device to a place in any State which has enacted a law providing for the exemption of such State from the provisions of this section, or to a place in any subdivision of a State if the State in which the subdivision is located has enacted a law providing for the exemption of such subdivision from the provisions of this section.

18 U.S.C. § 371:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

Petitioners Elmo T. Christianson and Herman Paster, together with one Allen Nilva, were indicted in the United States District Court for North Dakota on October 7, 1952, for conspiracy to violate the Johnson Act, 15 U.S.C. § 1172, which prohibits the interstate transportation of gambling devices. Named in the indictment as co-conspirators, but not made defendants, were James Brastrup, Neil Van Berkom and Cyrus Bechtel. The defendant Nilva was acquitted

at the first trial of the case in March, 1953, but the jury failed to agree as to the guilt of the petitioners Christianson and Paster. A mistrial was accordingly ordered as to the latter two individuals. They were tried again in March and April, 1954, and both were found guilty (R. 41). Petitioner Paster was fined $10,000 and sentenced to prison for two years; petitioner Christianson was sentenced to prison for a year and a day (R. 45). On appeal, their convictions were affirmed. 226 F. 2d 646; appendix hereto.

The indictment alleged (R. 3) that the defendants, in violation of 18 U.S.C.A. § 371[1], conspired and agreed in November, 1950, to transport gambling devices into North Dakota in violation of the Johnson Act, 15 U.S.C. § 1172, which became effective on January 2, 1951.[2] Petitioner Christianson was elected Attorney General of North Dakota on November 7, 1950, and took office on January 2, 1951. Petitioner Paster had for several years been engaged in the business of selling, distributing and operating coin-operated machines of various types, including gambling devices. He operated through several personally-owned and controlled Minnesota corporations, including the Mayflower Distributing Co., located at St. Paul, Minnesota. He resided and maintained his place of business at St. Paul. The territory in which he operated in the coin machine business included Minnesota, Iowa,

[1] Sec. 371 of Title 18 U.S.C.A. provides for fine or imprisonment "if two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose."

[2] As alleged in the indictment (R. 2), North Dakota had enacted no law exempting it or any of its subdivisions from the provisions of the Johnson Act.

North Dakota, South Dakota and Nebraska. Nilva was Paster's attorney and was also an executive of one of these corporations.[3]

According to the indictment (R. 4-6), the various co-conspirators intended to violate the Johnson Act to defraud the United States in the operation of that Act by:

1. Causing large numbers of gambling devices to be transported into North Dakota through the facilities of Paster.

2. Obtaining gambling devices at bargain prices, again through the facilities of Paster, by taking advantage of the fact that pending or enacted anti-gambling legislation in Congress and the renewed enforcement of state anti-gambling statutes would cause owners of gambling devices to sell at low prices.

3. Taking advantage of the fact that Christianson was or soon would be the Attorney General of North Dakota and that by or through him and the corruption of such other North Dakota officials as could be corrupted they would make a haven for the illegal operation of the said gambling devices in North Dakota.

By the foregoing means, the co-conspirators allegedly intended (R. 6) to place gambling devices in the hands of unidentified dealers and operators in North Dakota without the Attorney General of the United States being apprised of the information required under the Johnson Act. Gambling in North Dakota allegedly would thereby flourish, to the financial gain of the co-conspirators and to the defraudment of the

[3] Nilva's name was stricken from the indictment prior to the second trial, except where it appeared in the alleged overt acts (R. 18-20).

United States in the operation of the Johnson Act. Twenty-one overt acts in furtherance of the alleged conspiracy were set forth in the indictment (R. 6-11). Overt acts numbered 1, 2, 3, 4, 5, 6, 7 and 8 all pertained to matters allegedly occurring before January 2, 1951, while overt acts numbered 9, 13 and 19 pertained in part to events prior to that date.

As summarized by the Court of Appeals, 226 F. 2d at 648; appendix, p. 2a, *infra*: "The conspiracy charged was a continuing one. The gravamen of the charge was that in November, 1950, the conspirators conspired and agreed to transport gambling devices into North Dakota where they would be later operated under the protection of Attorney General-elect Christianson, after he assumed that office. The Johnson Act did not go into effect until January 2, 1951, hence the charged conspiracy was not unlawful under that Act at the time it was charged to have been initially conceived."

At the trial, the petitioners presented substantial and convincing evidence that such a conspiracy never existed and that neither of them had any part in it. Particularly did they attack the testimony and credibility of James Brastrup, an alleged co-conspirator who was the principal witness for the Government. But the jury weighed the evidence and found the petitioners guilty as charged.

Viewing the evidence in a light most favorable to the Government, the Court of Appeals affirmed the convictions and held that there was "abundant evidentiary support for the jury's finding that a conspiracy or agreement was entered into between Paster, Christianson and others, during the latter part of 1950 to move slot machines into the State of North Dakota where they were to be operated after Christianson be-

came Attorney General in January, 1951." 226 F. 2d at 651-2; appendix, p. 9a, *infra*. It further held that there was adequate evidentiary support for the jury's finding that slot machines were transported into North Dakota after January 2, 1951, the effective date of the Johnson Act, pursuant to the agreement of the conspirators. Hence the court rejected petitioners' contention that the trial court erred in denying their motions for a verdict of acquittal made at the close of the Government's case and at the close of all the evidence.

Prior to the trial, the District Court (sitting at Bismarck, N. D.) issued two subpoenas addressed to the Mayflower Distributing Co. (located in St. Paul, Minn.), directing it to produce certain documents and records (R. 20, 22). Petitioner Paster moved (R. 24) to quash these subpoenas on the ground that the Mayflower Distributing Co. was solely owned and controlled by him and that requiring the production of the documents and records would violate his rights "under the fourth and fifth amendments in that he has been required, and is now directed, to furnish evidence against himself." After oral evidence was taken (R. 56-59), the motion to quash was denied (R. 28-29, 59).

On the third day of the trial, the District Court concluded that the officers of the Mayflower Distributing Co. had failed to comply with one of the foregoing subpoenas (No. 160) and it ordered that all of the records of that company and two other corporations owned by Paster, whether the records be kept in St. Paul, Minn., or elsewhere, "be impounded and taken into the possession of the United States Marshal of the District of North Dakota, to be produced in this Court whenever required" (R. 35). A writ of assistance was issued to the said Marshal to aid in the enforcement of

the order. Pursuant to this order, the records were seized in St. Paul by the United States Marshal for the District of Minnesota, who made a detailed receipt and inventory of the records seized (R. 36-41) and turned the seized material over to the Marshal in North Dakota. When this inventory was filed, petitioner Paster moved that all papers and documents referred to therein be suppressed on the grounds that (1) they were his personal property, (2) the District Court in North Dakota was without jurisdiction to make the impounding order and the Marshal in Minnesota was without jurisdiction to seize the property, and (3) the seizure constituted "an unlawful search and seizure of the defendant's property" (R. 164). This motion was denied and Paster's further objections to the introduction of the various papers into the record were overruled. These rulings by the District Court were all affirmed by the Court of Appeals.[4]

Following the judgment of the Court of Appeals, the petitioners presented a petition for rehearing. It was denied on December 5, 1955. On December 27, 1955, Mr. Justice Clark ordered that the time for filing this petition for a writ of certiorari be extended to and including February 3, 1956.

REASONS FOR GRANTING THE WRIT

This case involves important and novel questions concerning the administration of criminal justice in the federal courts, particularly with reference to the stand-

[4] The Court of Appeals also dismissed the other contentions raised before it by the petitioners with respect to the validity of the indictment, the cross-examination of Paster, the attack on the credibility of a defense witness, the use of a summary of records by a Government witness, the effect on the jury of certain newspaper articles, and the court's instructions to the jury.

ards of proof required for a conviction of conspiracy to violate laws of the United States. These questions have been resolved by the Court of Appeals in a manner which conflicts with the pertinent precedents established by this Court and other appellate tribunals. And the Court of Appeals has acted in flagrant disregard of its duties as a reviewing court.

1. This Case Raises an Important and Novel Question as to the Standard of Proof Required for a Conviction of Conspiracy to Violate a Federal Law

In the words of the Court of Appeals, 226 F. 2d at 652, *infra,* p. 11a, "The situation presented is unusual." It is unusual in that the federal law which was the focal point of the alleged conspiracy became effective subsequent to the formation of the conspiracy. No other case has ever posed in such full flavor the issue as to the proof required of the nature and existence of such a conspiracy after the effective date of the federal statute.

In affirming the judgment below, the Court of Appeals held that the evidence was sufficient to support the finding of the jury that a conspiracy or agreement had been entered into between petitioners and others in the latter part of 1950 "to move slot machines into the State of North Dakota where they were to be operated after Christianson became Attorney General in January, 1951." 226 F. 2d at 651-652; *infra,* p. 9a. The court further found that the Government had proved that this initial conspiracy was formed "in contemplation of and for the purpose of violating the law which later became effective." 226 F. 2d at 653; *infra,* p. 11a. The conspiracy was formed, in other words, "to later violate the Johnson Act when it became effective" on January 2, 1951.

It is manifest, however, and the court below so recognized, that the judgment of conviction could not be sustained on the foregoing proof alone "for the very obvious reason that the law making the conspiracy and its object unlawful had not yet gone into effect." 226 F. 2d at 652; *infra*, p. 11a. The evidence as to events occurring prior to January 2, 1951, could and did establish no more than an agreement that was entirely lawful at that time. Attention must therefore be focused on the proof of an unlawful conspiracy subsequent to the effective date of the Johnson Act.

The conspiracy statute underlying petitioners' conviction, 18 U.S.C. § 371, makes it a crime for two or more persons to "conspire" to commit an offense against the United States. And under well-established rules, a conspiracy is an agreement or meeting of minds between two or more individuals to commit an unlawful act. See *United States* v. *Rabinowich*, 238 U.S. 78, 88. Such an agreement, when given effect by overt act, is the gist of conspiracy. But not until the objective of the agreement becomes unlawful and partakes of an offense against the United States does the conspiracy become illicit under 18 U.S.C. § 371. It is thus essential that the agreement be shown to be in effect at some point after the objective is outlawed.

These familiar principles of the law of conspiracy point the way to the creation of the appropriate standard of proof in the unique circumstances of this case. The Johnson Act having become effective on January 2, 1951, both the agreement to violate that statute and an overt act giving effect to that agreement must be shown to have been effectuated on or after that date. Where, as here, there is proof of a pre-existing agree-

ment to violate the statute, evidence of a new or independent meeting of minds after the critical date would not be essential. It should be enough in this situation to demonstrate that the prior agreement was in some manner adhered to, continued or reaffirmed by two or more persons, although what constitutes adherence or reaffirmation remains unclear. Such proof, when combined with evidence of an overt act, would constitute the gist of a conspiracy as outlawed by 18 U.S.C. § 371.

The court below, in reference to the admissibility of evidence as to events preceding January 2, 1951, stated that the evidence was properly admitted "subject to and conditioned upon the making of proof that the conspiracy was adhered to, recognized and in effect reaffirmed, and its execution at least attempted after its objective became unlawful." 226 F. 2d at 653; *infra*, p. 12a. Only if there were such proof, said the court, could the jury consider evidence of a prior agreement to violate a law not yet in effect. And only then, the court continued, could the evidence of acts and admissions of each of the initial conspirators prior to the effective date of the Johnson Act constitute evidence of an unlawful conspiracy against the other conspirators.

But these statements related only to the theory of the admissibility of evidence as to the prior agreement. The Court of Appeals significantly did not elevate these references to reaffirmation and adherence to the status of an essential criterion of the conspiracy for which petitioners were convicted. Neither did it find, nor did it feel it necessary to find for purposes of determining the admissibility of evidence, that there had in fact been such a reaffirmation or adherence.

The court did say, however, that the instructions to the jury could have created no misunderstanding "that unless the agreement proved to have been made in the latter part of 1950, was recognized and adhered to to an extent which amounted to its reaffirmance after the Johnson Act became effective and an overt act was committed subsequent to the effective date of the Act, there could be no conviction for an unlawful conspiracy to violate the Johnson Act." 226 F. 2d at 652; *infra,* p. 11a. But the court here was merely referring to the jury's understanding of its instructions in relation to the evidence of the pre-existing agreement and at no point did the court below adopt this aspect of the instructions as its own standard of proof.

The central issue as to the proper standard of proof of the existence of an unlawful conspiracy after January 2, 1951, was thus evaded by the Court of Appeals. Despite its several oblique references to proof of reaffirmation and overt acts subsequent to the effective date of the Johnson Act, the court remained mute as to the standard of proof that should be followed in reviewing petitioners' conviction.

This unresolved standard presents an important and recurring issue. Since the legislative process of creating new statutory crimes is a continuing and seemingly endless one, the problem raised by this case extends far beyond the guilt or innocence of these two petitioners. Conspiracies to violate prospective or pending legislation are likely to continue long after the facts of this case are forgotten. But the question as to when these conspiracies became illegal and the proof required of such illegality will remain unsettled until resolved by this Court.

Certain aspects of this problem have arisen in the past. See *Nyquist* v. *United States,* 2 F. 2d 504 (C.A. 6); *Butler* v. *United States,* 138 F. 2d 977 (C.A. 7); *Bailey* v. *United States,* 5 F. 2d 437 (C.A. 5); *Schefano* v. *United States,* 84 F. 2d 513 (C.A. 5). And cf. *Heike* v. *United States,* 227 U.S. 131, 145; *Brown* v. *Elliott,* 225 U.S. 392, 401. But in none of those cases was the issue presented as squarely and as concretely as in this proceeding. In none of them was there created a standard of proof that is appropriate or controlling in this case. Only by the grant of certiorari to review the judgment below can this important and novel problem be appropriately resolved.

2. The Court of Appeals Abdicated Its Function of Reviewing the Evidence to Determine If It Was Sufficient to Satisfy the Standard of Proof as to an Unlawful Conspiracy

The Court of Appeals, in reviewing the record and affirming the convictions of the petitioners, failed to determine if there was sufficient evidence to sustain the convictions in the light of a proper standard of proof as to an unlawful conspiracy in existence on or after January 2, 1951. It made but two determinations:

a. It found that there was adequate evidence of a conspiracy formed during the latter part of 1950 to move slot machines into North Dakota where they were to be operated after Christianson became Attorney General in January, 1951, provided that the evidence relating to that agreement was binding on all conspirators only to the extent that each one reaffirmed the conspiracy after January 2, 1951.

b. It found that there was adequate evidence "that slot machines were transported into North Dakota subsequent to the effective date of the Johnson Act,

pursuant to the agreement of the conspirators." 226 F. 2d at 652; *infra* p. 10a.

As has been noted, the Court of Appeals made no effort to establish any requirement that there be any reaffirmation of, continuance of, or adherence to the conspiracy after the effective date of the Johnson Act, January 2, 1951. More importantly, the court neglected to view the record in order to determine if there was sufficient evidence of such reaffirmation or adherence. And it made no pretense of stating, much less demonstrating, that there had in fact been any reaffirmation of or adherence to the prior conspiracy.

Thus the only evidence the Court of Appeals found as to the existence of an illicit conspiracy after January 2, 1951, was that relating to the movement of slot machines into North Dakota after that date. The court apparently assumed that these were the overt acts which are required to manifest an unlawful agreement. But such evidence could not serve to satisfy the basic requirement of proof of a conspiracy after January 2, 1951—i.e., substantial evidence of a new meeting of the minds or of an adherence to, recognition of, or reaffirmation of the pre-existing conspiracy. These overt acts had no meaning apart from an illicit conspiracy formulated or reaffirmed after the effective date of the Johnson Act. They may well have been mere manifestations of a prior conspiracy, a conspiracy which was not reaffirmed after the crucial date.

The mere fact that certain interstate shipments may have been made after the effective date of the Johnson Act does not, of course, supply proof of reaffirmation or adherence on the part of either of the petitioners. Indeed, the record precludes any finding that

these two petitioners even knew about such shipments or participated in any way in their accomplishment (see R. 138-145, 178-179, 215-216). Nor was there any indication in the record that the petitioners or any of the other alleged co-conspirators ever met or otherwise communicated with each other or formulated any joint scheme after January 2, 1951.

In short, there was a complete absence of any proof that either of the petitioners or any of the other alleged co-conspirators ever adhered to, recognized or reaffirmed the conspiracy after January 2, 1951. The failure of the Court of Appeals to specify any such proof is a compelling indication of that fatal deficiency in the record.

Moreover, there is a substantial question as to whether any of the shipments in interstate commerce after the Johnson Act's effective date can properly be labeled overt acts in furtherance of an illegal conspiracy, even assuming one was in existence after January 2, 1951. The shipments apparently referred to by the court (226 F. 2d at 651; *infra*, p. 8a) were:

1. The sale of forty-three slot machines to one Emil Christianson of Williston, N. D., on January 25, 1951, at least three of which were shipped after the effective date of the Act. See R. 215, 222-226, 243-244. This evidence, apart from the fact that it was established through the illegal seizure of certain records (see p. 24, *infra*), did not indicate that the three machines were gambling devices within the meaning of the Johnson Act. And since Emil Christianson (not to be confused with the petitioner Elmo Christianson) was not named in the indictment as a co-conspirator, this evidence does no more than show a possible separate and isolated substantive offense.

2. The purchase by Stanley Baeder of four slot machines from the Mayflower Distributing Co. in December, 1950, all of which Baeder picked up and transported in his own truck from Minnesota to North Dakota on January 22, 1951. See R. 138-143. Neither of the two petitioners was shown to have had any connection with this transaction (R. 242) and there was no proof that the transaction was part of a plan to procure interstate shipments after January 2, 1951.

3. The shipment to Neil Van Borkem of eleven slot machines. The bill of lading was dated December 30, 1950, and the machines may actually have been picked up by the interstate carrier on that date. They left Minneapolis at 6:30 p.m. on January 2, 1951, and were delivered to Van Borkem at Minot, N. D., on January 4, 1951. See R. 178-179. Here there was no proof that this was a shipment clearly designed to cross state lines after January 2, 1951.

4. The shipment of three machines to Robert Sande of Williston, N. D., which shipment may have been completed in December, 1950. These machines were identified as not having drums and reels and hence were not within the purview of the Johnson Act. See R. 174.

Reliance by the court below on such dubious and inconclusive transactions to establish the requisite overt acts after January 2, 1951, directly conflicts with the established rule that a conviction for conspiracy can be sustained only if "upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt." *Curley* v. *United States,*

160 F. 2d 229, 232 (C.A.D.C.); *Wyatt* v. *United States*, 23 F. 2d 791 (C.A. 3). The proof must be such as to exclude every reasonable hypothesis of innocence. *Beckman* v. *United States*, 96 F. 2d 15 (C.A. 5); *Gerson* v. *United States*, 25 F. 2d 49 (C.A. 10). And when the evidentiary defect in this case is combined with the total absence of any evidence of a reaffirmation of the conspiracy by the petitioners after January 2, 1951, the result reached below is in conflict with this Court's holding in *Direct Sales Co.* v. *United States*, 319 U.S. 703, 711 that "charges of conspiracy are not to be made out by piling inference upon inference." See also *United States* v. *Falcone*, 311 U.S. 205, 210. Review of the record by way of certiorari, particularly in view of the abdication by the Court of Appeals of its duty to conduct a definitive review of the record utilized to support petitioners' convictions, thus becomes appropriate in this instance.

3. In Holding That There Was Proof of a Conspiracy Formed Late in 1950 to Violate the Johnson Act, the Court of Appeals Has Rendered a Decision Unsupported by the Record and in Conflict With Decisions of This Court

The conspiracy for which the petitioners were indicted and convicted was that of plotting to violate the Johnson Act's ban on interstate shipment of gambling devices. There was substantial evidence, said the Court of Appeals, that such a conspiracy was entered into during the latter part of 1950. But even assuming that such evidence was relevant to the existence of an unlawful conspiracy after January 2, 1951, the record does not support the court's determination as to the existence of a pre-Johnson Act conspiracy. Indeed, nowhere in the record is there any substantial evidence from which it could reasonably be concluded

beyond a reasonable doubt that there ever was an agreement to bring about the transportation of gambling devices across state lines after January 2, 1951.

That there was some sort of agreement between Brastrup and the petitioners involving the transportation of slot machines into North Dakota is not to be denied. It was an arrangement, according to the Government's evidence, whereby James Brastrup sought to utilize both Christianson and Paster in a scheme to extort payments from various slot machine operators in North Dakota. This evidence tended to show that Christianson was to receive a share of these payments for campaign expenses; in return he agreed to render favorable decisions and take certain favorable actions as Attorney General relative to the legality under North Dakota law of the operation of these various machines. Paster's part in the affair presumably was to help bring about the sale of machines to North Dakota operators and to help enforce the collection of money from them. If this evidence be accepted as true, there was proof of state crimes of extortion and bribery.

But the crime of conspiracy for which petitioners were convicted involved something other than extortion or bribery. By definition, it was directed solely toward the transportation of gambling machines across state lines in violation of the Johnson Act. It is that Johnson Act element that had to be proved in this case. And it is that element that lies at the core of the illegal intention on petitioners' part which the Government was compelled to prove.

Conspiracy, despite its vague and loose boundaries, is a crime that is predominantly mental in composi-

tion. It "consists primarily of a meeting of minds and an intent." Jackson, J., concurring in *Krulewitch* v. *United States,* 336 U.S. 440, 448. The evidence, in other words, must establish that there was unity of intent on the part of two or more persons to accomplish the illegal end charged. And the existence of that intent must be proved as a fact and is not to be presumed by way of inference or from equivocal evidence. See Harno, *Intent in Criminal Conspiracy,* 89 Univ. of Pa. L. Rev. 624, 632 (1941); Arens, *Conspiracy Revisited,* 3 Bflo. L. Rev. 242, 250 (1954). As stated by this Court in *Direct Sales Co.* v. *United States,* 319 U.S. 703, 711, "this intent, when given effect by overt act, is the gist of conspiracy. ... Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal."

It was thus essential that there be proof that the petitioners intended to bring about the interstate transportation of gambling devices in violation of the Johnson Act. To that end it was incumbent upon the Government to prove that the petitioners specifically intended to cause transportation after January 2, 1951, and that they knew or were chargeable with knowledge that any shipments after that date would be illegal. But such evidence was wholly lacking.

To the extent that interstate transportation was involved in the scheme to extort and bribe in violation of state law, there was no showing that such transportation was designed to occur after January 2, 1951, or that transportation after that date was the inevitable consequence of the scheme. Nor was there any indication that the petitioners knew or could have known that the Johnson Act was to become effective on January 2, 1951, and that they planned accordingly.

Since the Act had not been approved by the President prior to January 2, 1951, the petitioners cannot be charged with knowledge before that date that interstate shipments of gambling devices would definitely be illegal after that particular day. Conceivably the measure might have been vetoed, or its approval might have been delayed for any number of reasons.

In an effort to dramatize the devious, hidden, secret and clandestine methods assumed to be the hallmark of conspiratorial methods, the Government sprinkled the record liberally with references to travels by Christianson under false names, meetings in hotel rooms behind closed doors, the pocketing of sealed envelopes and the like. All such incidents had not the slightest relationship to any plan to violate the Johnson Act and only served to inflame the jury and to obscure the only relevant issue in the case.

Not even the testimony as to the interstate shipments occurring after January 2, 1951, if such testimony be accepted at its face value, could serve to demonstrate the existence of any such conspiracy as was charged. Those few shipments either began before the effective date or involved machines whose status as gambling devices under the Johnson Act was at best uncertain at that early period. See R. 241.

In other words, there was a fatal variance between the conspiracy charged and the conspiracy proved. It was not enough to sustain a conviction for conspiracy to violate the Johnson Act by reliance on a conspiracy to bribe state officials or to extort money from slot machine operators or by proof that the petitioners were guilty of some other criminal or generally bad conduct. The proof must establish guilt as to the par-

ticular charge in the indictment. *Salas* v. *United States*, 234 F. 842 (C.A. 2); *People* v. *Mader*, 313 Ill. 277, 145 N.E. 137; *Commonwealth* v. *Harley*, 7 Metc. 506 (Mass.).

The lower court's sustaining of the conviction under these circumstances thus conflicts with the decisions of this Court and other federal appellate courts holding that where one conspiracy is charged, proof of different and disconnected conspiracies will not support a conviction where—as is obviously true here—the variance is prejudicial. *Berger* v. *United States*, 295 U.S. 78, 81; *Bollenbach* v. *United States*, 326 U.S. 607; *Berenbeim* v. *United States*, 164 F. 2d 679, 683-4 (C.A. 10); *Brooks* v. *United States*, 164 F. 2d 142 (C.A. 5); *Canella* v. *United States*, 157 F. 2d 470 (C.A. 9).

4. The Decision Below Raises an Important Question Whether the Fifth Amendment Forbids the Use of Records of a Corporation to Incriminate the Sole Shareholder Thereof, Particularly Where the Keeping of Such Records Is Required for No Purpose Other Than the Disclosure of Violations of Law

The Court of Appeals held that the trial court had properly required the production of the books and records of the Mayflower Distributing Co. over the objection of petitioner Paster, who was an officer and director of that corporation and its sole shareholder, that such production violated his privilege against self-incrimination under the Fifth Amendment.

It is definitely established, of course, that this privilege is a general one and extends only to the personal property of the individual asserting it. *United States* v. *White*, 322 U.S. 694. And it is equally clear that an ordinary officer of a corporation who is charged

with a criminal offense may not assert his personal privilege under the Fifth Amendment and thereby preclude the use of corporate records, even though they be in his personal possession. *Wilson* v. *United States,* 221 U.S. 361.

But it has yet to be determined by this Court whether the privilege may be asserted as to corporate papers by an officer and director who is the sole shareholder and owner of the corporation, where the only purpose of the inquiry is to obtain evidence against the officer in his personal capacity. In such a situation, it may be said that the corporate arrangement does not destroy the necessarily individual or personal nature of the so-called corporate papers. If corporate assets and papers are in fact the personal property of one individual—even though he be clothed in a corporate veil—the reasons for precluding the use of the privilege as to ordinary corporate records do not apply. An individual should not lose his personal privilege merely because he alone assumes a corporate character, using only his assets and property. And because this issue is of obvious importance and of a recurring nature, a definitive determination of the matter by this Court is appropriate in this case.

In the instant case the incrimination of Paster was made particularly effective by reason of the fact that the records subpoenaed and seized included inventories, records and reports which his corporation was required to keep by reason of Section 3 of the Johnson Act, 15 U.S.C. § 1173. Those records serve no purpose whatever except to disclose violations of the substantive provisions of the Act and to serve as evidence against individual and corporate violators thereof.

The Johnson Act is not a revenue measure. It is not a regulatory measure. It prohibits absolutely the transportation of certain devices into states which have not exempted themselves from the application of the law. The incriminatory effect of the required reports and record-keeping, therefore, cannot be justified as merely the necessary incident to the proper exercise of Congressional taxing and regulatory powers. Section 3 serves only to require the disclosure of criminal acts.

The serious constitutional question presented by the judgment below was anticipated, at least in part, by Mr. Justice Black, with Mr. Justice Douglas concurring, in *United States* v. *Five Gambling Devices*, 346 U.S. 441, 452, fn.[5] The individual, even when acting through a solely-owned corporation, must choose between failing to maintain the required records, which is a violation of the statute, and maintaining the same with certain knowledge that they can be used to convict him. The important privilege of the Fifth Amendment should not be so lightly denied, nor should its protection be extended only to those who choose not to do business through the corporate entity.

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[5] Mr. Justice Black stated: "Holding that the Act requires reports of interstate sales would raise a serious constitutional question. The Act makes it a crime to transport gambling devices in interstate commerce. Consequently, requiring monthly reports of sales and deliveries made by an interstate dealer would require him to make monthly reports of his own crimes. The Fifth Amendment provides that no person shall be compelled 'to be a witness against himself.'"

5. The Decision Below Raises an Important and Heretofore Unresolved Issue as to the Use By the Government of Evidence Illegally Seized From a Solely-Owned Corporation in the Trial of the Individual Owner of That Corporation

The Court of Appeals considered and rendered judgment on an important and heretofore unresolved issue growing out of the impact of the search and seizure clause of the Fourth Amendment. This issue was created by petitioner Paster's objection to the introduction of records of the Mayflower Distributing Co. seized in St. Paul, Minn., pursuant to an impounding order or search warrant issued by the District Court in Bismarck, N. D. Such a seizure was clearly unlawful by virtue of Rule 41(a) of the Federal Rules of Criminal Procedure, which provides:

> *Authority to Issue Warrant.* A search warrant authorized by this rule may be issued by a judge of the United States or of a state or territorial court of record or by a United States commissioner *within the district wherein the property sought is located.* [Emphasis added.]

A North Dakota federal court, in other words, cannot authorize the impounding or seizure of records in Minnesota. Such authority could only come from a court or commissioner in Minnesota.

It is essential that there be strict compliance with the requirements of Rule 41(a). *Murvy* v. *United States,* 293 F. 849 (C.A. 1); *United States* v. *Musgrave,* 293 F. 203 (D.C. Neb.); *United States* v. *Borkowski,* 268 F. 408 (D.C. Ohio). Otherwise any seizure of goods is illegal and objection to the introduction thereof into evidence may be made under the Fourth Amendment. See *Honeycutt* v. *United States,* 277 F. 939 (C.A. 4). As this Court said in *Silverthorne Lum-*

ber Co. v. *United States,* 251 U.S. 385, 392, "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all". And see *Rea* v. *United States,* No. 30, Oct. Term 1955, decided January 16, 1956.

The Court of Appeals purported not to determine Paster's rights under the Fourth Amendment in this connection since the issue was said not to have been raised in the trial court or in the original brief on appeal. In this respect the Court of Appeals was in plain error. Paster clearly contended in the trial court (R. 164) that the seizure of the records by virtue of the extraterritorial impounding order constituted "an unlawful search and seizure of the defendant's property." And while the original brief on appeal did not mention the Fourth Amendment as such, the statement of points and authorities (Brief, p. 28) referred in points B-2 and B-3 to the trial court's error in "the Issuance of an Order Impounding Records", and in "Denying the Motion of Appellant Paster to Suppress the Evidence Seized under such Order." The argument in the brief in support of those points (Brief, pp. 43-46) referred to Rule 41(a) and the resulting illegality of the seizure.

At any rate, the Court of Appeals was fully apprised of Paster's contention in his reply brief and the court in fact denied that contention on its merits. By reference to *Lagow* v. *United States,* 159 F. 2d 245 (C.A. 2), cert. denied, 331 U.S. 858, the court held that Paster, as the sole shareholder and officer of the Mayflower Distributing Co., could not object to the

introduction of any records that may have been illegally seized from the corporation.

Thus the Fourth Amendment issue was actually raised and actually decided. In its present posture, that issue is whether the Government may utilize evidence illegally seized from a wholly-owned corporation in the trial of the owner of that corporation and whether such an individual has standing to object to the introduction of this evidence.

This issue, in its precise setting, has never been resolved by this Court. But this tribunal has given a clear warning that illegally acquired evidence may never be used at all by federal officers. In *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385, the Court expressly held that records illegally seized from a corporation could not be used against either the corporation or its officers. The rationale of that decision is even more strongly applicable to this case, where the corporation is solely owned by the individual officer. See also *In re Dooley,* 48 F. 2d 121 (C.A. 2). And more recently, in *Rea* v. *United States,* No. 30, Oct. Term 1955, decided January 16, 1956, this Court stated that the federal rules outlawing illegal searches and seizures "are designed as standards for federal agents ... They are designed to protect the privacy of the citizen, unless the strict standards set for searches and seizures are satisfied. That policy is defeated if the federal agent can flout them and use the fruits of his unlawful act either in federal or state proceedings."

The principle enunciated in these cases makes clear that the federal policy against illegal searches and seizures gives substance to petitioner Paster's standing to object to the use against him of illegally seized

evidence. And especially should he have status to object where the seized corporate records are in reality his own personal records by virtue of his sole ownership of the corporation. Vindication of Paster's right in this respect and of the federal rule outlawing illegal searches and seizures demands that the problem be subjected to the full deliberation of this Court by way of certiorari.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit should be granted.

Respectfully submitted,

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February 3, 1956.

APPENDIX

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 15,299 and 15,300

ELMO T. CHRISTIANSON AND HERMAN PASTER, *Appellants*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeals from the United States District Court
for the District of North Dakota

[November 1, 1955]

Philip R. Bangs and Alvin C. Strutz for Appellant Christianson; William P. Murphy (John W. Graff was with him on the brief), for Appellant Paster.

Oliver Dibble, Special Assistant to the Attorney General (Warren Olney III, Assistant Attorney General, and William R. Mills, Assistant United States Attorney, were with him on the brief), for Appellee.

Before SANBORN, COLLET, and VAN OOSTERHOUT, Circuit Judges.

COLLET, Circuit Judge.

Defendants Elmo T. Christianson, Herman Paster, and Allan Nilva were indicted October 7, 1952, for conspiracy

to violate the Johnson Act, 15 U.S.C. 1172, which prohibits the interstate transportation of gambling devices. Defendant Christianson was elected Attorney General of the State of North Dakota, November 7, 1950. He took office January 2, 1951. Defendant Paster had for several years been extensively engaged in the sale, distribution and operation of coin-operated machines of various types, including gambling devices. See *Nilva* v. *United States,* 212 F.2d 115. He operated through several personally-owned and controlled Minnesota corporations located at St. Paul, Minnesota, where he resided and maintained his place of business. Defendant Nilva was attorney for Paster and an executive of one of these corporations. Named in the indictment as co-conspirators, but not made defendants, were James Brastrup, Neil Van Berkom, and Cyrus Bechtel. The conspiracy charged was a continuing one. The gravamen of the charge was that in November, 1950, the conspirators conspired and agreed to transport gambling devices into North Dakota where they would be later operated under the protection of the Attorney General-elect Christianson, after he assumed that office. The Johnson Act did not go into effect until January 2, 1951, hence the charged conspiracy was not unlawful under that Act at the time it was charged to have been initially conceived. Upon the first trial of this case in March, 1953, Defendant Nilva was acquitted. The jury failed to agree concerning the guilt of Christianson and Paster. A mistrial was ordered as to the latter, and they were again tried in March, 1954, when they were both convicted. From that conviction both appeal. Motions for a directed verdict were made at the close of the Government's case and again at the close of all the evidence.

The most important question is whether the evidence is sufficient to sustain the convictions. Christianson emphasizes the point that even if the evidence was sufficient to establish the agreement charged, and even if it later ripened into an unlawful conspiracy by reason of adherence to the

original agreement and its performance and execution by overt acts subsequent to the effective date of the Johnson Act, there is no evidence to support the jury's finding that he was a party to any conspiracy to violate the Johnson Act after it became effective. Without conceding the existence of the original agreement charged to have been entered into in 1950, he insists that if the evidence was sufficient to sustain the jury's finding that such an agreement was entered into in 1950, the evidence conclusively shows a legal renunciation of or withdrawal from such agreement prior to the time anything was done to carry it out after the Johnson Act became effective.

Much of the evidence pointing to the defendants' guilt came from the testimony of the witness James Brastrup, who testified for the prosecution. Although Brastrup's credibility was vigorously attacked, it is reasonable to conclude from an examination of the rather extensive record that if the jury had not accepted as true at least the important features of Brastrup's testimony, there would have been no conviction. And since the jury must weigh the credibility of the testimony, we are relegated on appeal to an appraisal of its sufficiency and not its convincing force. As it has been so frequently stated, we must on appeal view all of the evidence in its most favorable aspect to the jury's verdict. It is in that light that the following facts are stated. Many facts appearing in the record which would be conducive to a conclusion opposed to the jury's verdict need not, for the reason stated, be recited. And for the benefit of defendants' counsel, we should observe that in their zeal to advance the cause of this clients' interests, they have in their briefs minimized the Government's evidence to the point of the exclusion of many salient facts, possibly overlooking our rules which require an objective presentation of the material facts.

There was substantial evidence that Christianson, then a candidate for Attorney General of North Dakota, went to Brastrup in July, 1950, asking for assistance in raising

money for campaign expenses. Brastrup gave him $50.00 at that time. About ten days later, Brastrup and Christianson again discussed campaign funds, at which time Brastrup agreed to solicit such funds in return for favors from the Attorney General's office in the event of Christianson's election. In October, 1950, Christianson told Brastrup he absolutely had to have money. Brastrup told him that he, Brastrup, understood there was some "out-of-state" money available. Christianson said he did not care where it came from as he had to have it. Brastrup told Christianson about a slot machine distributor and operator who might furnish funds. Brastrup had heard of Paster but did not know him or know how to communicate with him. Brastrup made inquiry about Paster, obtained a letter of introduction to Paster and made an appointment by telephone to meet Paster in St. Paul. Brastrup met Paster in St. Paul, October 20, 1950, told Paster that he, Brastrup, was representing Christianson, who was sure to be elected Attorney General of North Dakota, and that Brastrup wanted money for Christianson's campaign. Paster told him that he, Paster, would not put up the money at that time, but that if Brastrup would put up the money and Christianson was elected, Paster would see that the money was paid back, that all Christianson would have to do as Attorney General would be to make some rulings and give some opinions "that would overlook the operation of machines in North Dakota." Later Brastrup called Paster by telephone from North Dakota and verified this understanding with Paster. In that conversation Brastrup expressed optimism about Christianson's campaign. Paster indicated satisfaction and told Brastrup to come to see him after the election.

Christianson was elected at the election held November 7, 1950. After the election Allan Nilva called Brastrup, congratulated him on Christianson's election, and in the same telephone conversation Paster told Brastrup he would like to meet Christianson. Brastrup so informed Christianson. Christianson and Brastrup went to St. Paul the fol-

lowing day by plane. Brastrup purchased the tickets, giving Christianson's name as "Nelson" at Christianson's direction. They went to Paster's office in St. Paul. Paster was busy and kept them waiting. Christianson expressed uneasiness about being there so long and asked Brastrup if they couldn't just get the money and get out "right away". However, they soon saw Paster, who told Christianson that he had a bright political future if he would "do things right, take good advice and stay out of trouble." While they were talking, Paster had a long distance telephone call, during which Paster said to the other party that "he's right here now," and looking to Christianson and Brastrup asked if they could go to Chicago. The latter agreed. Paster obtained the plane tickets, purchasing Christianson's in the name of "Larson." Arriving in Chicago, Brastrup, Christianson and Paster went to hotel rooms maintained by the Bally Manufacturing Company and here met a Mr. Maloney, the owner of that company, which manufactured coin machines. They spent the evening there. During the evening Paster and Maloney called Christianson into a small room where they remained for some time. When they came out, Brastrup asked Christianson if they had fixed him up. Christianson replied, "Yes. You don't need to worry; everything is going fine. They're going to carry out their end of the agreement." Both stayed there that night. Both were given presents, a supply of which was kept in the rooms for customers. Paster offended Brastrup by asking Christianson in Brastrup's presence if Christianson knew Brastrup well and cautioning Christianson to be sure Brastrup did not get drunk and tell everything he knew. The next day they returned to St. Paul. Arriving at Paster's office, Paster handed Christianson an envelope, saying "Here is the other thousand dollars and that makes it." Christianson replied, "That's right", and put the envelope in his pocket. Paster then told Christianson that if Christianson lived up to his part of the bargain he would live up to his and that although Christianson would be offered a lot of money while he was in office, it did not

matter what he was offered, he, Paster, would always do better and would keep him out of trouble. On the plane going back to Grand Forks, North Dakota, from St. Paul, Brastrup asked Christianson if he needed all of the $2,000.00 and Christianson said he did, that he was buying a house.

Early in November, 1950, prior to the election on November 7, 1950, Brastrup met Christianson and Cy Bechtel (one of the named coconspirators) in Minot, North Dakota. Christianson told Bechtel that he, Bechtel, would be transferred from the Laboratories Department to a liquor inspector's position and that Bechtel's job would be to collect money from private clubs for the operation of slot machines and punch boards. After Christianson became Attorney General, he appointed Bechtel an inspector in his office and told Bechtel to "go ahead and contact the clubs the way Brastrup wanted [him] to." In April, 1951, Bechtel told Christianson that Brastrup was collecting too much money and that they couldn't get away with it. When Bechtel got home from that trip he read in the newspaper that he had resigned from the Attorney General's office, although he had not resigned. He was rehired in May and fired in June.

In the latter part of November, 1950, Brastrup was called by Paster to a meeting of "machine operators" at St. Paul. Paster was undertaking to sell machines and get them into North Dakota before the Johnson Act became effective. A number of such operators from North Dakota were there. Paster told them that Brastrup was Christianson's representative in North Dakota and the man to whom they were to pay the money for operating the machines. Paster said that a "great windfall" had happened to the North Dakota operators and there was "going to be a lot of cake out there"—that the arrangement had been made in that room only a few days before. At that meeting some concern was privately expressed by one of the North Dakota operators to Brastrup over the "Syndicate", referring to Paster, moving into North Dakota. The question was raised as to whether it would not be better to permit a Lou Stearns to

handle such things instead of having an outside syndicate move in. Brastrup called Stearns by telephone. Stearns insisted that he was going to represent Christianson in western North Dakota and that no syndicate was going to move in. Paster said at the meeting that rumors had been circulated that Stearns, not Brastrup, was to be Christianson's agent, but that he, Paster, "had it from the man's own mouth" that Brastrup was to be the man and that Brastrup was the man the North Dakota operators were to pay. Later, in December, 1950, Brastrup told Christianson about the rumors that had been going around concerning Lou Stearns and that Paster had called him, saying that he, Paster, had been getting a number of calls from people saying that Christianson had changed his mind and was going to deal through someone else. Christianson said he would go with Brastrup to St. Paul and straighten Paster out "once and for all". They went to St. Paul, saw Paster, and Christianson reaffirmed the arrangement theretofore made. On that occasion Paster bought Christianson a new suit to wear at his inauguration.

Late in December, 1950, Paster called Brastrup saying that a law was going into effect soon which would prohibit moving the machines from Minnesota to North Dakota and suggested that storage space be obtained for the machines in North Dakota or near the state line so they could be easily moved in. No such arrangement was actually made. Brastrup went to St. Paul, December 26, 1950, and complained to Paster that he was getting many calls from North Dakota operators inquiring how the machines were to be handled and through whom they were to be purchased, that he could not answer those questions and that the procedure agreed upon was not good. Paster took a gun from his desk drawer and informed Brastrup that if he talked too much, double-crossed him, or lost his nerve that he could "easily be taken care of". At the same meeting it was agreed that Christianson, Paster and Brastrup would operate the machines at the clubs and share the proceeds.

Forty-three slot machines were sold to Emil Christianson, Williston, North Dakota, January 25, 1951. Transportation charges were paid by the Mayflower Distributing Company. It is difficult to determine from the record the exact date of the shipment, but three of these machines were not received by the Mayflower Company at St. Paul until January 18, 1951, hence at least those three were shipped subsequent to January 2, 1951. Stanley Baeder of New Rockford, North Dakota, purchased four slot machines from the Mayflower Distributing Company in December, 1950, and went to St. Paul, Minnesota, after them himself on January 22, 1951, taking them from St. Paul to New Rockford, North Dakota. The Mayflower Distributing Company bought and ordered shipped to Neil Van Berkom, Minot, North Dakota, eleven slot machines, under bill of lading dated December 30, 1950. These machines left the carrier's terminal at Minneapolis, Minnesota, at 6:30 p.m., January 2, 1951, and were delivered at Minot, January 4, 1951. There was evidence indicating a shipment made to a Mr. Sande in North Dakota late in December, 1950, or in January, 1951, the record of which had been withdrawn from the Mayflower Distributing Company's records upon direction of Allan Nilva. The invoices covering the four slot machines sold to Stanley Baeder were not put on his account. Defendant Paster testified that Van Berkom still owed over $12,000 because machines sold him had not been paid for and the law prevented their return to Minnesota.

Christianson had, prior to January 2, 1951, promised to appoint as an inspector someone to be recommended by a man named Binek, of Dickinson, North Dakota, who was dissatisfied with previous inspectors. On Christianson's inauguration day, January 3, 1951, a man named Wolf reported to Brastrup at Bismarck to take the job. He was the man Binek had recommended. Christianson protested appointing Wolf because there was much objection to Wolf and he was being pressed to appoint another man. Finally, Christianson had Wolf brought into his office, had him sign

a form of an oath of office, told him he was on the pay roll but to keep it quiet while the Legislature was in session. It appears that Wolf was never put on the pay roll.

In the latter part of February, 1951, Brastrup, Cy Bechtel and Christianson met in Grand Forks, North Dakota. Bechtel told Christianson that a number of small clubs were objecting to the amount of money demanded of them and asked Christianson if it would be all right to collect only 10 per cent. Christianson agreed. Bechtel said that he had heard rumors that Christianson and Brastrup were "all through" and asked Christianson whom he should turn the money over to. Brastrup said it was agreeable with him for Bechtel to pay it direct to Christianson, but Christianson said for Bechtel to turn the money over to Brastrup and that the latter would deal with him.

There was evidence of bank deposits of currency by Christianson as follows: October 25, 1950, $180.00; November 27, 1950, $100.00; December 4, 1950, $480.00; December 12, 1950, $680.00; December 22, 1950, $700.00; March 2, 1951, $250.00; April 4, 1951, $350.00. Brastrup collected approximately $2900.00 from slot machine operators between December 29, 1950, and March 12, 1951, inclusive, which he testified he turned over to Christianson after deducting certain expenses. Christianson and Brastrup had a settlement April 21, 1951, evidenced by a written release being given Christianson by Brastrup reciting that in consideration of the payment of $1560.00 to Brastrup the latter released Christianson of any and all claims "from the beginning of the world to the date hereof."

The record contains abundant evidentiary support for the jury's finding that a conspiracy or agreement was entered into between Paster, Christianson and others, during the latter part of 1950 to move slot machines into the State of North Dakota where they were to be operated after Christianson became Attorney General in January, 1951, if the evidence relating to that agreement or conspiracy was

admissible over defendants' objection that since the Johnson Act was not then in effect and the conspiracy was not then an unlawful one under that Act, it should not have been received in support of the charge of an unlawful conspiracy to violate the Johnson Act. We will consider the question of the admissibility of this evidence later.

There was also adequate evidentiary support for the jury's finding that slot machines were transported into North Dakota subsequent to the effective date of the Johnson Act, pursuant to the agreement of the conspirators.

A more difficult question arises as to whether the evidence showed Christianson's participation in the conspiracy to transport the machines into North Dakota and to operate them there, or whether Christianson's participation was only in an agreement to permit them to operate after they got there—a conspiracy within a conspiracy, so to speak, not transgressing the prohibitions of the Johnson Act. And the further question raised by Christianson, that the evidence shows conclusively that he withdrew from any agreement which might have been made before the Johnson Act became effective, warrants consideration. But upon analysis these difficulties resolve themselves into a doubt as to the weight of the evidence in view of Christianson's emphatic denial of wrong doing and the very considerable evidence he offered in support of his denial. The weight of the evidence was for the jury to determine. It was not compelled to believe Christianson's evidence. It obviously did not or he would not have been convicted. Finding, as we must, that there was adequate and sufficient evidentiary support for the jury's verdict, it must not be disturbed.

Defendants challenge the admissibility of evidence relating to matters occurring prior to January 2, 1951, the effective date of the Johnson Act, under the rule that admissions or acts of a conspirator after the conspiracy has terminated or prior to its formation are not competent evidence against a co-conspirator. *Brown* v. *United States,* 150 U.S. 93;

Morrow v. *United States,* 11 F.2d 256; *Gerson* v. *United States,* 25 F.2d 49; *Collenger* v. *United States,* 50 F.2d 345; *Minner* v. *United States,* 57 F.2d 506; and *Lane* v. *United States,* 34 F.2d 413 are cited in support of this rule. An examination of these and many other cases to the same effect will demonstrate that the rule is not applicable here. This evidence was preliminary in the sense that it could not in itself and by itself establish an unlawful conspiracy for the very obvious reason that the law making the conspiracy and its object unlawful had not yet gone into effect. The trial court so instructed the jury. There could have been no misunderstanding that unless the agreement proved to have been made in the latter part of 1950, was recognized and adhered to to an extent which amounted to its reaffirmance after the Johnson Act became effective and an overt act was committed subsequent to the effective date of the Act, there could be no conviction for an unlawful conspiracy to violate the Johnson Act. It was also made clear that the evidence of acts and admissions of alleged conspirators occurring prior to January 2, 1951, was, at the time it was offered, to be received as evidence of only that conspirator's intent. To make such evidence binding on other conspirators, it was necessary that the proof be forthcoming that the conspiracy was in effect reaffirmed after January 2, 1951.

The situation presented is unusual. The Government's theory, which the evidence supported, was that prior to the effective date of the Johnson Act arrangements were made, agreements entered into, and a conspiracy formed to later violate the Johnson Act when it became effective. The evidence complained of therefore established a conspiracy not at the time unlawful, but which would become unlawful if adhered to, reaffirmed and attempted to be carried out later. It was charged and proved that the initial conspiracy was formed in contemplation of and for the purpose of violating the law which later became effective. Proof of the establishment of a conspiracy for the

purpose of violating a law not yet in effect may be made, subject to and conditioned upon the making of proof that the conspiracy was adhered to, recognized and in effect reaffirmed, and its execution at least attempted after its objective became unlawful. Then, but only then, may the evidence of acts and admissions of each of the initial conspirators constitute evidence of an *unlawful* conspiracy against the other conspirators. It is no transgression of the rule forbidding the use of evidence of acts or admissions of one conspirator occurring before the conspiracy was formed or after it terminated against another conspirator, to admit evidence establishing an existing conspiracy to violate a law soon to be but not then in effect. This evidence was properly admitted.

Defendant Paster contends that the records of the corporation Mayflower Distributing Company, were improperly used as evidence against him in violation of his rights under the Fifth Amendment. His point is that he was the owner of the Mayflower Distributing Company, the records were really his personal records and by the court's action in issuing a subpoena to the Mayflower Company to produce the records and their subsequent use, Paster was required to produce evidence which was used against him.

The force and effect of *Wilson* v. *United States*, 221 U.S. 361, is recognized by Paster. But he contends that these records were in fact his personal property and that under *United States* v. *White*, 322 U.S. 699, he could assert his personal privilege as to the corporate records. The doctrine so clearly stated in *Wilson* v. *United States* to the effect that an officer of a corporation, charged with a criminal offense, may not assert his personal privilege under the Fifth Amendment against self-incrimination and fail to produce or complain of the use of corporate records, even in his personal possession, is well settled. Nor do we find anything in *United States* v. *White*, *supra*, which indicates an intention on the part of the Supreme Court to

overturn *Wilson* v. *United States.* The *White* case involved the refusal on the part of an officer of a labor union to produce for Grand Jury inspection the record of the unions. The officer's objection was based upon the ground that the records might tend to incriminate the union and himself personally. He claimed his objection was sustained by both the provision of the Fifth Amendment against self-incrimination, now involved, and also by the protection of the Fourth Amendment prohibiting unlawful searches and seizures. The court reiterated its former holdings that the privileges asserted against self-incrimination were purely personal. That part of the opinion in the *White* case which Paster relies on we quote:

"Moreover, the papers and effects which the privilege protects must be the private property of the person claiming the privilege, *or at least in his possession in a purely personal capacity. Boyd* v. *United States,* 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746." (Italics supplied.)

In the *White* case the union was not incorporated. In the *Boyd* case to which the Supreme Court refers in the above quotation, there was no corporation involved and the papers ordered produced were the private papers of a defendant. The *Boyd* case does emphasize the close relationship between the Fourth and Fifth Amendments in protecting a private person against self-incrimination, but neither that case nor the *White* case militates against or modifies the established principle that corporate records are not the private property of an individual protected by the Fourth and Fifth Amendments. The facts in the present case present no ground for an exception to that rule.

Throughout the trial and in this court up to the time of the filing of his reply brief, Paster was asserting that the records of the corporation could not be used against him because they were in fact his personal records. Paster says in his brief that "throughout the trial" he "held to

the position that the records sought by the Government were only nominally the records of the corporation, that the records were in his personal possession and control, and that such possession entitled him to the protection of the Constitution." In his reply brief for the first time he seeks to take advantage in his own behalf of the corporation's immunity from unlawful search and seizure under the Fourth Amendment, relying upon *Silverthorn Lumber Co.* v. *United States,* 251 U.S. 385. He assumes that the records were unlawfully seized under color of an allegedly illegal extraterritorial impounding order of the District Court of North Dakota. The record indicates that the corporation never objected to the production of the records or sought their return, albeit Paster did. When this case was tried the first time, in March, 1953, the records were voluntarily produced by the corporation. Some of them were used, apparently without protest, in another criminal case against Paster and other defendants in the case of *Nilva* v. *United States,* 212 F. 2d 115, tried in the District of Minnesota, involving the transportation of slot machines from Iowa to Minnesota. A short time before the second trial of this case in March, 1954, the District Court of North Dakota issued a subpoena for the records. The subpoena was not obeyed, Paster appearing and claiming his personal privilege in the records. That claim was denied, whereupon Paster's counsel stated that the records, would be produced. When, on the third day of the trial, they had not been produced, the court issued a forthwith subpoena and an impounding order which was executed in Minnesota by the United States Marshal for the District of Minnesota, who delivered the records to the Marshal for North Dakota, who in turn produced them in court. Paster again objected to their use on the ground they were his personal records.

Paster places reliance upon the case of *In Re Dooley,* 48 F.2d 121 (2 Cir.). But the same court in *Lagow* v. *United States,* 159 F.2d 245, in passing upon the question

of whether Lagow, the sole shareholder and officer of a corporation, could prevent the use of corporation records, illegally seized (and ordered returned to the corporation), against Lagow, said:

"When a man chooses to avail himself of the privilege of doing business as a corporation, even though he is its sole shareholder, he may not vicariously take on the privilege of the corporation under the Fourth Amendment; documents which he could have protected from seizure, if they had been his own, may be used against him, no matter how they were obtained from the corporation. Its wrongs are not his wrongs; its immunity is not his immunity." (Citing cases.)

But we do not determine the question of Paster's rights under the Fourth Amendment. The foregoing explanation of the situation in this case has been incorporated to demonstrate the lack of appeal on the merits of Paster's contention. The question now raised in the reply brief does not appear to have ever been presented to the trial court. Certainly it was not presented in such a manner as to direct attention to the precise question now urged. Nor did it so appear in the points and authorities in Paster's original brief in this court. It is a cardinal rule of appellate practice, that, absent some compelling or persuasive reason to avoid an obvious miscarriage of justice, questions not presented to the trial court and not properly presented on appeal will not be considered. For that reason we do not determine this question.

It is asserted that the indictment is invalid for want of plainness, conciseness and definiteness. It is not subject to such infirmities. And the claim that it contained extraneous matter prejudicial to the defendants is likewise without merit. That part of the indictment complained about was neither read to nor read by the jury.

It is also contended that the indictment was invalid because it alleged a conspiracy beginning prior to the effec-

tive date of the Johnson Act. As heretofore noted, the indictment charged a continuing conspiracy. It was not invalid because it charged that the conspiracy began before the Johnson Act became effective. *United States* v. *Randall*, 140 F.2d 70.

Error is charged on account of the cross-examination of the Defendant Paster. The general rules of cross-examination are well defined. They need not be restated. These general rules must have some flexibility in order that they may be properly applied to the great number of varied situations which arise. To accomplish the necessary flexibility and at the same time preserve the basic and substantive objectives of these rules, a considerable area of discretion is assigned to the trial court in applying the rules to a specific situation. Such a situation must be viewed and reckoned with by the trial court in the light of all related incidents occurring during the trial and cannot be confined to an isolated question or series of questions. While the questions complained of, which the court required Paster to answer, did not in themselves tend to prove or disprove the specific charge, they were sufficiently germane to portions of Paster's direct examination and statements of his counsel as to prevent the trial court's rulings from being an abuse of discretion.

One of defendants' witnesses was asked on cross-examination why she terminated a former employment and was asked if embezzlement of $200.00 of her employer's funds was not the reason. She answered that there was some "money trouble" but that she would not say that it had been called embezzlement. Out of the hearing of the jury it was made known to the trial court that she had confessed to appropriating $250.00 of her employer's money to her own use and had pleaded guilty to a criminal charge of larceny and received a sentence of six months.

Evidence of the conviction of crime as affecting the credibility of a witness is limited to conviction of a felony,

an infamous crime, or a crime involving moral turpitude. *Pittman* v. *United States,* 42 F.2d 793. The crime of larceny or embezzlement involves moral turpitude. *Tillinghast* v. *Edmead,* 31 F.2d 81; *United States* v. *Savoretti,* 200 F.2d 546; *In Re Kirby,* 73 N.W. 92; *In Re Henry,* 99 P. 1054. There was no error in permitting the cross-examination.

A summary, or "schedule" as it was called, was made by an F.B.I. agent of the number of slot machines purchased and sold by the Mayflower Distributing Company between November 6, 1950, and April 15, 1951. The agent was an accountant but does not appear to have been qualified as an expert on what kinds of machines should be classified as "slot machines". The records from which the summary was made were in court at the time the agent testified. He was permitted to testify from his summary what the records showed as to the number of slot machines purchased and sold.

Counsel recognize the general rule that data taken from voluminous records may be used by a witness when the records are available for use in cross-examination to show any inaccuracies in the witness's memoranda. The objection went to the lack of qualification on the part of the witness to differentiate between machines which were slot machines within the meaning of the Johnson Act and which were not—a question of law. The classification of certain machines as slot machines by the witness was an expression of an opinion. But the records were readily available to defendants from which it could have been readily ascertained which machines the witness had treated as slot machines in making the calculation resulting in the total number he said the records showed had been purchased. No effort was made to do so, and we find no complaint that the witness's classification was incorrect. The court instructed the jury concerning what devices were gambling devices within the meaning of the Johnson Act.

We find no possible prejudice to the defendants from the use of the memorandum under these circumstances.

We have been requested to examine newspaper articles for the purpose of determining whether there was likelihood of such an unfavorable emotional atmosphere existing at the time of the trial that defendants could not have had a fair trial. It is conceded that in view of the cautionary instructions given that the effect of these articles would probably not in itself be considered reversible error. It does not appear whether the jury actually saw the articles. In deference to defendants' wishes we have examined the articles. We find nothing in them which leads to a belief that they could have resulted in defendants being deprived of a fair trial. On the contrary, these articles appear unusually objective.

The court's charge is objected to on the ground that it implied that the conspiracy charged could have been entered into prior to January 2, 1951. The charge told the jury that if such an agreement was made prior to January 2, 1951, to constitute the offense charged, it was necessary that the object of the conspiracy was to violate the Johnson Act and that it continue until after January 2, 1951. There is no merit in the criticism for reasons heretofore stated.

The defendants were accorded a fair trial. There being no error, the judgment is affirmed.

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